

## California Fair Political Practices Commission

### MEMORANDUM

**To:** Chairman Getman, Commissioners Downey, Knox and Swanson

**From:** Natalie Bocanegra, Commission Counsel  
John Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel

**Date:** August 23, 2002

**Subject:** **“Public Generally” Exception for Small Jurisdictions: Pre-notice Discussion of Amendment to Regulation 18707.3**

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#### I. ISSUE

Should regulation 18707.3, the “public generally” exception applicable to small jurisdictions, be revised to revert to its pre-Phase 2 rule? In the alternative, have Phase 2 amendments created less need for this exception?

#### II. INTRODUCTION

Commission regulations permit a public official who has determined that he or she has a conflict of interest to participate in a decision if the “public generally” exception applies. The “public generally” exception contains a primary rule which is provided at regulation 18707.1, followed by specific rules which apply to particular circumstances. One of these specific rules pertains to small jurisdictions (regulation 18707.3) and applies to a conflict of interest arising from real property which serves as a public official’s personal residence.

At the request of a number of small cities, staff presents draft regulatory language addressing this exception. The amendments are based on proposals submitted by the Town of Yountville in conjunction with other small jurisdictions and are meant to address consequences resulting from Phase 2 regulatory changes. Specifically, the distance at which a real property interest is considered “directly involved” in a decision was increased from 300 feet to 500 feet. This change affected the application of the small jurisdiction “public generally” rule of regulation 18707.3.

In December 2001, Commission staff attended a League of Cities meeting to discuss the small jurisdiction exception with representatives from a number of small cities.<sup>1</sup> Cities which submitted written comments on this issue are Yountville, Plymouth, San Pablo, and St. Helena. (Attachment 1: letter from the Town of Yountville.) Based on a review of these comments and

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<sup>1</sup> Yountville, Emeryville, Carpinteria, Willits, Del Mar and Calistoga attended this meeting.

proposed amendments, staff has drafted regulatory language which synthesizes enforcement considerations with the concerns voiced by these small cities.

## II. DISCUSSION

### A. History and Purpose of the “Public Generally” Exception for Small Jurisdictions

The small jurisdiction exception was adopted by the Commission in September 1990 in response to the requests of a number of geographically compact jurisdictions which expressed concern in part over the application of the “300-foot rule” for determining direct involvement. (Memorandum to the Commission regarding “Adoption of Proposed Regulation 18703.1 – Public Generally; Small Jurisdictions,” December 21, 1989.) The City of Signal Hill was one of the jurisdictions concerned with this issue as it related to a public official’s disqualification stemming from ownership of his or her personal residence. To legislatively address the issue, the city supported SB 1722 (Beverly) introduced at that time. This bill sought to exempt principal residences of all public officials in ALL jurisdictions from the conflict-of-interest provisions of the Act. Viewed as not furthering the purposes of the Act (as required by section 81012), the Commission opposed SB 1722. However, the Commission decided to examine the issues.

In its 1989 memorandum to the Commission on the small jurisdiction “public generally” exception, staff explained that in most cases it appears that decisions regarding development affect a significant segment of the population of a small jurisdiction like Signal Hill in substantially the same way that the decision affects the public officials. Staff recommended consideration of a regulation which provided for specific application of the “public generally” exception in small jurisdictions. The staff memorandum addressed application of the then-proposed exception and said that the exception would apply:

“...only to those decisions involving land use questions which would have an indirect effect<sup>2</sup> on the principal residence of an elected officer or public official....automatic application of the exception would not be available to a public official whose principal residence will be uniquely affected by a decision before the agency.” [Emphasis and footnotes added.]

Under the regulations in effect at that time, if a decision directly affected real property in which an official had an interest, then the exception would not apply. Similar to the Commission’s current regulations, a decision was deemed to directly affect real property if:

- The decision involved the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of real property in which the official had a direct or indirect interest (other than a leasehold interest) of \$1,000 or more, or a similar decision affecting such property;

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<sup>2</sup> The December 1989 memorandum and the small jurisdiction regulation use the terms “indirect effect” and “direct effect” to describe “indirect involvement” and “direct involvement,” respectively. The Commission has continued to use these terms interchangeably in the context of the small jurisdiction exception. (*Biddison* Advice Letter, No. A-00-149; *Johnson* Advice Letter, No. A-00-150.)

- The decision involved the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of such property;
- The decision involved the imposition, repeal or modification of any taxes or fees assessed or imposed on such property;
- The decision was to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area. (*Ibid.*)

However, where the real property was indirectly affected by the decision, the effect of the decision could still be deemed material if a public official's property was within 300 feet of the subject property. (*Ibid.*; see Figure 1.) For all other situations, property located beyond 300 feet but within 2,500 feet of the subject property was materially affected if its fair market value was increased or decreased by at least \$10,000, or if its rental value was increased or decreased by \$1,000 per 12 month period. (*Ibid.*)

Therefore, from its inception, the small jurisdiction exception required that the official's property be a threshold distance (more than 300 feet) from the subject property in order for the exception to apply.

### **PRE-PHASE 2 RULE (Figure 1)**

Within 300 feet:

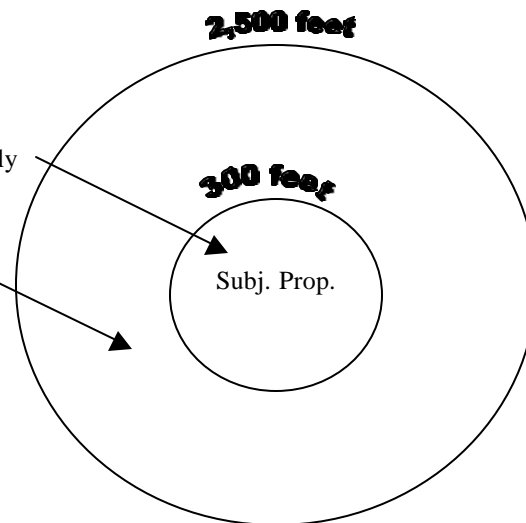
Indirect involvement, material effect, exception did not apply

Beyond 300 feet but within 2,500 feet:

Indirect involvement, material effect only if decision's  
Effect on fair market value \$10,000, exception applied

Beyond 2,500 feet:

Indirect involvement, no material effect absent  
specific circumstances, exception rarely used



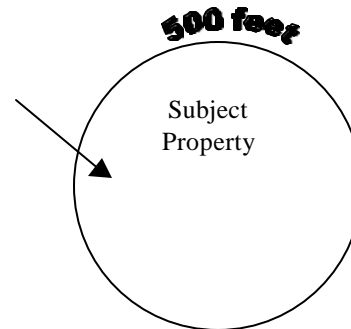
The small jurisdiction “public generally” exception has been substantively amended three times. It was amended in March 1996, May 1999, and most recently in February 2001 to change the 300-foot distance to a 500-foot distance in conformity with Phase 2 changes. The Phase 2

changes eliminated the 300 – 2,500 foot circle (depicted in Figure 1) and made property located within the most inner circle subject to a direct materiality test instead of an indirect test. (See Figure 2.)

### **PHASE 2 RULE (Figure 2)**

Within 500 feet: Presumption of materiality  
Direct involvement, material effect, exception does not apply

Beyond 500 feet: Presumption of non-materiality  
Indirect involvement, no material effect absent  
specific circumstances



### **B. Effect of Phase 2 Changes**

During discussion at the December 2001 League of Cities meeting, representatives of the small cities in attendance unanimously supported revision of regulation 18707.3 since the jurisdictions have found that the Phase 2 changes made the regulation less likely to apply.<sup>3</sup>

The replacement of the “300-foot rule” with the new “500-foot rule” for determining direct effects on real property creates a situation where the radius of 500 feet from each of the residences of their public officials encompasses much of the jurisdiction.<sup>4</sup>

The representatives explained that the 500-foot rule is simply too restrictive in very small jurisdictions. As a result, city attorneys attempt to determine whether a particular official may participate under the “public generally” exception in current regulation 18707.1 (Step 7). However, gathering the material facts needed to apply this exception taxes the limited resources of many small jurisdictions and makes application of the exception burdensome. Oftentimes, pursuant to the “legally required participation” rule, the governing body ultimately will use a random selection method. Based on comments from the representatives, the frequent use of this method is undesirable since it undermines a particular official’s representation of the jurisdiction’s citizens by making that representation dependent on the “luck of the draw,” and it ensures that only a bare quorum will vote, making action difficult due to need for unanimous decisions. A letter from the City of Emeryville summarizes the small cities’ concerns:

“The City of Emeryville was pleased with the Commission’s decision to eliminate the ‘donut’ rule for determining if a conflict exists when a real property interest is involved. Having just two tests depending on whether the property is

<sup>3</sup> The Town of Yountville views these changes as severely limiting application of the regulation. Staff agrees that this regulation now applies in more limited circumstances. However, this application is consistent with how the exception was applied prior to Phase 2 changes.

<sup>4</sup> See Attachment 2: map for the Town of Yountville illustrating distances of 500 feet from real property interests held by members of the Yountville Town Council.

500 feet away from the property that is the subject of the governmental decision is easier to apply than the three tests under the old regulation.

However, in changing all references to 500 feet in the regulations, including the small jurisdiction exception, the effect was to make the exception more onerous than the standard rule. We do not believe that it was the Commission's intent to eviscerate the small jurisdiction exception...."

Regulation 18707.3 in present form provides:

"(a) The effect of a governmental decision on the principal residence of a public official is not distinguishable from the effect on the public generally where all of the following conditions are met:

(1) The public official's agency has jurisdiction over a population of 25,000 or less.

(2) The decision does not have a direct effect (as provided in Title 2, California Code of Regulations, section 18704.2(a)) on the real property that serves as the public official's principal residence.

(3) The real property that serves as the public official's principal residence is more than 500 feet from the boundaries of the property which is the subject of the decision.

(4) There are at least 100 properties under separate ownership which are within a 2,500 foot radius of the boundaries of the property which is the subject of the decision.

(5) The principal residence is located on a parcel of land not more than one acre in size, or which, under the zoning and subdivision regulations of the jurisdiction in which it is located, cannot be further subdivided.

(6) The effect of the decision on the official's real property interest will be substantially the same as the effect of the decision on the majority of the residential properties which are beyond 500 feet, but within 2,500 feet of the boundaries of the real property that is the subject of the decision.

(b) For purposes of this regulation, 'principal residence' means the domicile of a person, in which the person's habitation is fixed, wherein the person has the intention of remaining, and to which the person, whenever he or she is absent, has the intention of returning. At any given time, a person may have only one principal residence. With respect to units in condominium complexes, planned unit developments, and similar residences, 'the real property that serves as the public official's principal residence' and 'principal residence,' as used in this regulation, means the unit or space in which the official has a separate ownership interest."

Where the official's property is *within* 500 feet of the subject property, this small jurisdiction exception *will never* apply because all of the conditions cannot be met. However, under existing rules, if the official's residence is not within 500 feet, he or she will have no conflict of interest, without proof of specific circumstances that it is reasonably foreseeable that the decision will have a material financial effect on the official's property (Regulation 18705.2(a)(1)).

As a result, the Phase 2 changes make the small jurisdiction exception applicable only in instances where the official's residence is beyond 500 feet, *and* where there is proof of specific circumstances that make it reasonably foreseeable that the decision will have a material financial effect on the official's residence, creating a conflict of interest for the official. (Regulation 18705.2(b)(1).) This application may be a logical consequence of the Commission's policy decision to eliminate the middle (over 300 feet but within 2,500 feet) zone. Under the pre-Phase 2 rules, the small jurisdiction exception never would have applied to an official's residence located within the 300-foot distance. Rather, under the old rules, the exception would have applied only to an official's residence which was located more than 300 feet from the subject property but within 2,500 feet, a distance at which it was almost always unclear whether a conflict of interest existed.<sup>5</sup>

Proponents of amendments to the regulation argue that the small jurisdiction rule may no longer be as effective as a result of the Phase 2 changes. In most cases, the primary "public generally" rule will apply since the jurisdictions are small in size.<sup>6</sup> Such was the case in advice recently issued to Mayor Holt of the Town of Yountville. (*Troedsson* Advice Letter, No. A-01-172.) In that letter, the primary "public generally" rule of regulation 18707.1 applied rather than the rule of regulation 18707.3 for the reasons noted above. The letter concluded that the mayor was permitted to vote in a floodwall decision since the effect of the decision on the mayor's property was not distinguishable from the effect on the public generally. Nevertheless, as mentioned, gathering the facts necessary for this "public generally" analysis required significant resources from the small jurisdiction.

It is possible that the elimination of this middle zone or "gray area" may have also eliminated the need for the special small jurisdiction rule since it is now very clear that property outside of the first zone is presumed *not* to experience a material financial effect from a particular decision. However, this issue is distinct from the concern raised by the small cities - - that the distance of 500 feet creates too many conflicts of interest for their public officials.

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<sup>5</sup> Beyond 2,500 feet, it was generally presumed that there was no material financial effect on the officials property and therefore no conflict of interest. (See more detailed discussion of these former rules in the staff memorandum on "Amendments to Regulation 18704.2: Determining Whether Directly or Indirectly Involved in a Governmental Decision: Interest in Real Property," also in this agenda packet.)

<sup>6</sup> The primary "public generally" rule of regulation 18707.1 does not distinguish between decisions where the official's economic interest does or does not experience a direct effect (is directly involved).

### C. Proposed Changes

**Decision 1(A) and (B) (subdivision (a)(2)):** Should the “public generally” exception applicable to small jurisdictions be modified to apply in instances where the public official’s residence is “directly involved” in a governmental decision?

**Current Rule:** The regulation may not be used in any case where the official’s residence is “directly involved” as described in regulation 18704.2. The current regulation contains the following requirements (in addition to several others):

“(2) The decision does not have a direct effect (as provided in Title 2, California Code of Regulations, section 18704.2(a)) on the real property that serves as the public official’s principal residence.

(3) The real property that serves as the public official’s principal residence is more than 500 feet from the boundaries of the property which is the subject of the decision.”

**Proposal Based on Yountville Comments:** Modify these two requirements to instead provide:

“(2) The decision does not have a direct effect (as provided in [proposed] Title 2, California Code of Regulations, section 18704.2(a)[**Decision 1A**] (2) – (6)) on the real property that serves as the public official’s principal residence.

(3) The real property that serves as the public official’s principal residence is more than [**Decision 1B**] ~~500~~ 300 feet from the boundaries of the property which is the subject of the decision.”

The effect of these textual changes would be to allow application of the regulation in instances where the official’s residence is directly involved (*i.e.* within 500 feet of subject property, but more than 300 feet) by removing the reference in subdivision (a)(2) to regulation 18704.2(a)(1) (the “500 foot test”) and creating a new 300 foot standard which only applies for purposes of this regulation.

**Discussion/Staff Recommendation:** During its July 2000 meeting, the Commission recognized that eliminating the middle zone (more than 300 feet and within 2,500 feet), and presuming no conflict beyond 300 feet, could result in situations where an official would be permitted to participate in decisions where a potential conflict of interest would have previously existed. The Commission also recognized that the effect of this 500-foot rule might be different in a city such as Dixon, which is 3.8 square miles in area, as compared to a city like San Francisco, which is comprised of 46.7 square miles, when considering the change to the materiality standards. (*Ibid.*) However, the Commission did not specifically discuss the potential effect of the distance change on the small jurisdiction regulation.

Staff does not support amendment of regulation 18707.3 to allow an official to participate in decisions in which the official's residence is directly involved in the decision. By amending subdivision (a)(2) and (a)(3) of regulation 18707.3 in this manner, the Commission would develop a rule that would allow public officials in small jurisdictions with residences beyond 300 feet but within 500 feet of the subject property to participate in decisions despite that fact that in the same circumstances in all other jurisdictions a conflict of interest is presumed. This disparity did not occur under the old version of the regulation. The Enforcement Division also expressed strong reservations to such an amendment.<sup>7</sup>

If the Commission rejects the amendment allowing use of the regulation where a public official's residence is directly involved, staff does recommend deleting subdivision (a)(3) because it is now redundant since the distance test (500 feet) is now covered in regulation 18704.2 which specifies when an official's real property interest is directly involved in a decision. The Commission has already decided during Phase 2 that where the official's real property interest is within 500 feet of the subject property, the official's property is deemed "directly involved" in the decision. Thus, absent the special "300 foot rule," subdivision (a)(3) is unnecessary. It is subsumed in subdivision (a)(2).

***Decision 2 (subdivision (a)(4)):* Should application of the regulation only be permitted where there are at least 100 properties under separate ownership are within a 2,500 foot radius of the boundaries of the property which is the subject of the decision?**

**Current Rule:** Subdivision (a)(4) requires:

"There are at least 100 properties under separate ownership which are within a 2,500 foot radius of the boundaries of the property which is the subject of the decision."

**Proposal Based on Yountville Comments:** Delete this requirement.

**Discussion/Staff Recommendation:** This regulation uses two different center points for distance measurement. The 2,500 foot rule in (a)(4) and the 500 to 2,500 foot rule in (a)(6) are both measured from the property which is the subject of the decision outward. In (a)(4) the measure is used to determine if there are a sufficient number of other properties (at least 100 under separate ownership) around the site to ensure that the official is not uniquely affected. This provision was adopted by the Commission in February 1996 to be consistent with the public generally concept. The subdivision was added in place of narrowing factors that were deleted because they did not fit in the "public generally" analysis.<sup>8</sup> (Memorandum to the Commission regarding "Adoption of...Regulation 18703.1: Public Generally - Small Jurisdictions; Principal Residence," January 22, 1996.) The 1996 memorandum stated:

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<sup>7</sup> Officials in small jurisdictions are not without recourse since a presumption of materiality and therefore a conflict of interest can be rebutted if requirements of the primary "public generally" rule are met. Additionally, an agency in a small jurisdiction should never find itself lacking a quorum due to the conflict-of-interest rules since the "legally required participation" rule may be invoked, although, as previously mentioned, the "legally required participation" rule may only provide a bare quorum.

<sup>8</sup> The factors deleted were requirements that the public official reside within the jurisdiction and that the public official, if elected, was elected in an at-large election.



“...since the basis for the regulation is that most (if not all) the officials reside near the project site, if the area surrounding the project site is sparsely populated, the exception is unnecessary.”

Staff recommends that subdivision (a)(4) be retained in accordance with the Commission’s 1996 policy determination to craft a narrow exception. Deleting this provision would reverse the Commission’s 1996 determination that the small jurisdiction exception be given a narrow construction. Staff acknowledges the 2,500 foot radius has now been eliminated in other Commission regulations. The Commission may want to retain the 100 properties test without reference to this distance.

***Decision 3 (subdivision (a)(6)): Conforming Change.***

**Current:** The current regulation requires the following:

“The effect of the decision on the official's real property interest will be substantially the same as the effect of the decision on the majority of the residential properties which are beyond 500 feet, but within 2,500 feet of the boundaries of the real property that is the subject of the decision.”

**Proposal Based on Yountville Comments:** Change the 500 foot language to 300 feet.

**Discussion/Staff Recommendation:** For the same reasons noted above, staff recommends against changing the 500 foot standard to 300 feet. Again, it may be appropriate to delete the reference to 2,500 feet.

***Decision 4 (subdivision (a)(1)): Should cities that exceed the population threshold of the regulation be able to use the regulation if they are of relatively compact size?***

**Current:** The current regulation only applies to city with populations of 25,000 or less.

**Proposal Based on San Pablo Comments:** The City of San Pablo requests that the regulation be amended to apply to either cities of small population or cities of compact geographic area.

**Discussion/Staff Recommendation:** The amendment of subdivision (a)(1) would provide an alternative to the population requirement that must be met before the small jurisdiction exception can be applied. The original version of current regulation was more restrictive as it contained both a population *and* geographical requirement. The original 1990 version of the regulation read:

“(1) The public official’s agency has jurisdiction over a population of 25,000 or less, *covering a geographic area of ten square miles or less.*” [Emphasis added.]

The additional geographical requirement was deleted in 1996. Reasoning for this deletion was as follows:

“The original intent behind this requirement was to keep the regulation narrow. The 1989 memorandum in support of Regulation 18703.1 stated that jurisdictions with large land areas would be less likely to have multiple conflicts of interest in a decision because their officials will generally be spread out in contrast to those officials in compact jurisdictions...Thus, there was no apparent need for the regulation in cities with larger land areas.

However, in cases such as Indian Wells, while the land area is larger than that of many small cities, because of geographical limitations, most of the population is still centralized in a smaller area. Thus, the land area requirement appears to be unduly restrictive.”

The City of San Pablo raises a concern with regard to the (a)(1) population requirement. Because its population is about 30,000, San Pablo cannot avail itself of the small jurisdiction exception even though they contend that “San Pablo is a ‘small jurisdiction’ in every sense of the word.” The city states that the 500-foot rule has even more of an exclusionary effect in cities the geographic size of San Pablo (2.6 square miles) as opposed to cities with less population but greater geographic size. For this reason, Decision 4 presents an alternative to the population requirement by allowing a jurisdiction to qualify for the small jurisdiction exception on the basis of its small geographic size. Including this geographic alternative would broaden the application of the “public generally” exception for small jurisdictions.

The draft language presents the options of 1 - 4 square miles.<sup>9</sup> The following information illustrates how many cities (out of 477 cities) in California would qualify as small jurisdictions under each of these options:

- 38 cities (8%) have an area of 1 square mile or less
- 84 cities (18%) have an area of 2 square miles or less
- 117 cities (25%) have an area of 3 square miles or less
- 154 cities (32%) have an area of 4 square miles or less

(Figures based on data from *California Planners' Book of Lists*, Governor's Office of Planning and Research, 2001.)

While adding a geographical alternative for qualification as a small jurisdiction could solve the problem raised by San Pablo, such an alternative would broaden the exception. Currently, about 49% (236) of California cities have a population of 25,000 or less (*Ibid.*) and are considered “small jurisdictions.”

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<sup>9</sup> 500 feet equates to approximately .095, or one tenth, of a mile.

The following numbers of cities do not currently meet the population criterion, but would meet one of the proposed square mileage criteria:

- If the area of 1 square mile is selected: 1 city not previously eligible would qualify
- If the area of 2 square miles is selected: 5 cities not previously eligible would qualify
- If the area of 3 square miles is selected: 12 cities not previously eligible would qualify
- If the area of 4 square miles is selected: 20 cities not previously eligible would qualify

Staff Recommendation: While a geographical measurement for defining a small jurisdiction seems logical since a conflict of interest is determined on geographical measurement (*i.e.*, the 500-foot rule), staff believes this language is unnecessary. If a 1 or 2 square mile criterion is chosen, at most 5 additional cities would be able to use the small jurisdiction exception. This number may not warrant a regulatory change. Selecting a 3 or 4 square mile criterion would result in more than half of the cities in California being eligible for this “exception.” The largest city to qualify would be Lynwood (3 square miles) with an approximate population of 69,000.